7-1-2009

# Smith v. Washington County Idaho Appellant's Brief Dckt. 35851

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| DAVID D. SMITH<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>WASHINGTON COUNTY IDAHO and its Commissioners, Rick Michael, Roy Mink, and Mike Hopkins, all acting in their capacity as Commissioners of Washington County, Idaho,<br><br>Defendants/Respondents. | SUPREME COURT<br>DOCKET NO. 35851<br><br>APPELLANT'S BRIEF |

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# APPELLANT'S BRIEF

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Appeal from the District Court of the
Third Judicial District of the State of Idaho
In and for the County of Washington

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HONORABLE STEPHEN W. DRESCHER, District Judge.

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## STATEMENT OF THE CASE

### A. Course of Proceedings:

**February 29, 2008,** David D. Smith (hereinafter Smith) filed a verified complaint for mandamus and other relief. R. Vol. I, p.6.

**March 19, 2008**, Washington County (hereinafter County) filed an answer admitting the Weiser Fire District and the Cambridge Fire District (hereinafter District) have road widths of 16 feet. R. Vol. I, p.14. The answer further alleges that the issuance of a building permit would be in violation of the Washington County Code. R. Vol. I, p.16. The answer admitted that the County had not made a decision on Smith's application for a building permit. R. Vol. I, p. 15-16.

**March 31, 2008**, Smith filed a motion for order requiring Washington County to grant a building permit to Smith. R. Vol. I, p. 2.

**April 16, 2008**, the Trial Judge entered an order requiring Washington County to make a decision on Smith's application for a building permit within 14 days. R. Vol. I, p. 18-19.

**April 28, 2008**, Washington County filed its Findings of Fact, Conclusions of Law, and Order. R. Vol. I, p. 22. The Findings, Conclusions, and Order failed to make any decision on the application for a building permit, but instead rendered a decision only on the variance request.

**May 5, 2008**, Washington County filed an Amended Findings of Fact. R. Vol. I, p. 2.

**May 23, 2008**, Smith filed a Second Motion and Memorandum for Order requiring Washington County to issue a building permit. R. Vol. I, p.3.

**May 27, 2008**, the Trial Judge issued an order declaring the procedure to be an appeal from the County's Amended Findings of Fact, declaring Smith's motion, memorandum, and documents to be the appeal brief, and giving the County's time to file its opposing brief. R. Vol. I, p. 58.

**June 24, 2008**, Washington County filed its brief. R. Vol. I, p. 3.

**July 11, 2008**, Smith filed his responsive brief. R. Vol. I, p. 3.

**July 25, 2008**, the parties stipulated to a decision by the Trial Judge without further oral argument. R. Vol. I, p. 3.

**September 5, 2008,** the Trial Judge entered his Memorandum Decision and Order reversing the decision of Washington County, and remanded for issuance of building permit. R. Vol. I, p. 61.

**September 15, 2008,** Washington County filed a motion to reconsider. R. Vol. I, p. 3.

**September, 19, 2008**, Smith filed his motion for attorney's fees and costs. R. Vol. I, p. 3.

**September, 19, 2008**, Smith filed his affidavit and memorandum in support of motion for attorney's fees and costs. R. Vol. I, p. 66-102.

**October 17, 2008,** Smith filed his Amended Affidavit of Counsel re Costs. R. Vol. I, p. 103.

**October 23, 2008**, Smith filed an affidavit of Tim Helfrich in support of motion for attorney's fees and costs and objection to motion to reconsider. R. Vol. I, p. 107.

**October 27, 2008**, the Trial Judge denied Washington County's motion to reconsider and denied Smith's motion for attorney's fees and costs. R. Vol. I, p. 111.

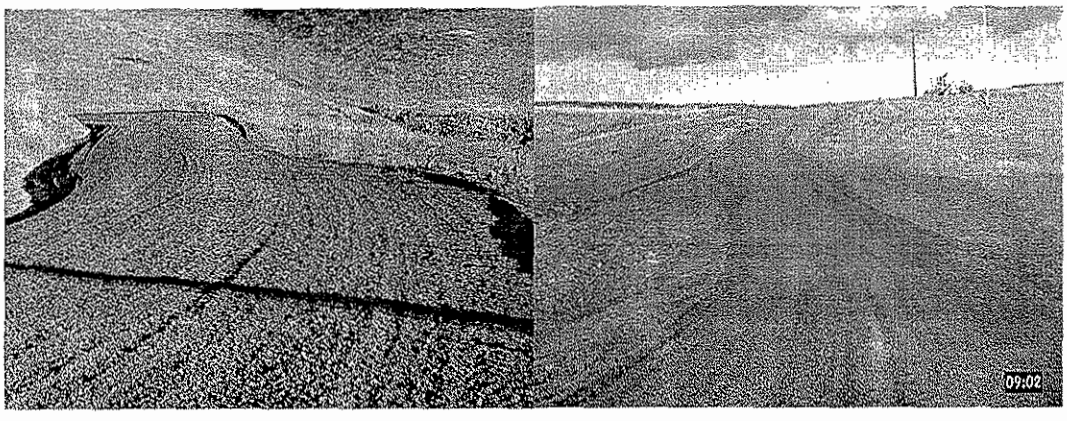
**November 12, 2008**, Smith filed a notice of appeal on the issue of denial of attorney's fees and costs. R. Vol. I, p. 113.

February 18, 2009, the Court entered its Final Order. R. Vol. I, p. 120.

**March 10, 2008**, Smith filed an amended notice of appeal. R. Vol. I, p. 124.

**B. Statement of Facts:**

In 2006, David D. Smith (hereinafter Smith), a retired U. S. Air Force Colonel, purchased real property located in Midvale, Idaho for the purpose of building a residence. Smith reviewed the Washington County code to determine the proper avenue for construction of his driveway, barn, and residence. In the fall of 2006 he built the driveway and barn. The driveway was fully in compliance with the width, turn-outs, and grade required by the Washington County code. The driveway is shown as follows:




After the driveway and barn had been constructed, Smith applied to the Washington County Commissioners (hereinafter County) for a building permit to

construct the residence. R. Vol. I, p. 14 and 15-16. The residence was intended to be an "earth shelter" which is partially, at least, covered with earth. Washington County requires the applicant for a building permit to pay a fee.

Instead of giving Smith the building permit so he could build his residence, the County required him to go before the Washington County Planning and Zoning Commission (hereinafter the P & Z). The P & Z advised Smith that the County has an "unwritten policy" to require a residential owner to get permission from the local fire district in order to grant a building permit. The P & Z advised that the Midvale Fire District (hereinafter District) had refused to give its acceptance to the building permit because the driveway was not 20 feet wide, and that Smith needed to go to a meeting with the Midvale Fire District to determine what needed to be done to obtain the Districts approval.

Smith went to the Midvale Fire District, which is composed of a three person board. The District refused to grant permission to Smith to have a driveway 16 feet in width. Sixteen feet in width is the requirement of all the other fire districts in the County of Washington, specifically the Weiser Fire District and the Cambridge Fire District.

Despite the efforts of Smith, the County failed to make a decision, either granting or denying the building permit. Prior to filing suit, Smith had met numerous times with the P & Z, the District, and the County, never obtaining a building permit or variance.

The Trial Judge referred to the foregoing as a:

> "lengthy delay during which the County took no action on the application for a building permit." R. Vol. I, p. 62.

See also County's answer at R. Vol. I, p. 14:

> "Plaintiff has appealed the decision denying the building permit to the Washington County Board of Commissioners and the Commissioners have not made a decision on that appeal."

Smith filed suit for mandamus to compel the County to make a decision on the application for a permit and on the variance appeal. Smith's contention, among others, centered on the theory that the failure to make a decision was tantamount to a denial. Smith contended he had complied with all requirements of the Washington County Code.

As the photographs above reflect, Smith's driveway would be the envy of most "roads" (not driveways) the public travels each day in Washington County.

The County sought, without any factual or legal basis, to require Smith to build his driveway in excess of the width of nearly half the roads maintained by the public in Washington County, and in excess of the driveway widths both the Weiser and Cambridge Rural Fire Districts find sufficient for safety. R. Vol. I, p. 14.

That position alone was arbitrary, because the County continued to grant building permits for homes in the Weiser and Cambridge Fire Districts with driveways only 16 feet in width. Presumably, the County would not have done so if those widths were unsafe.

The difference between the Weiser/Cambridge fire safety threshold versus that of the Midvale safety threshold is the cost of building an extra 4 feet of driveway width. In Smith's case the extra cost would have been over $25,000 because of the length of the driveway. The Midvale Rural Fire District's fire chief is a road builder by profession. He benefits directly by the increased cost of driveway construction.

As the District Judge found, the procedure used by the County in this case was difficult to figure out. It took between 1½ and 2 years to get a simple building permit.

On September 5th 2008, Judge Drescher published his Memorandum Decision and Order, finding the following:

> "Upon review of this, this Court concludes that **the procedural course of this case is in shambles. Documents were lost, hearings advertised and not held, procedures not followed, and the like**. Sifting through the hodgepodge, this Court was able to determine the following: In this case, Washington County Code 5-2-1 provides a minimum width for private driveways that serve two or more houses. **There is no code that addresses the minimum width for a driveway providing access to only one house, as is the case here**. The County asserts that the IFC clearly requires a twenty foot minimum width. However, the evidence presented indicates that **there is confusion and a lack of uniformity between the fire districts within Washington County as to the interpretation and application of the IFC.** This conflict in combination with the actions of the Commissioners in **failing to hold the required hearings** and **failing to maintain documentation**, leads to the conclusion that the decisions to deny the permit and variance are not only **not supported by substantial evidence**, but are likewise **arbitrary** and **capricious** and **an abuse of discretion**. Moreover, This Court finds that the **failure of the board and the commissioners to follow proper procedures** as well as their **failure to evaluate the applications for a permit and for a variance upon a non-conflicting standard** did result in the **violation of a substantial right of the landowner, Smith**." R. Vol. I, p. 3-4.

Based on the foregoing, and undoubtedly being the prevailing party, Smith sought reimbursement of his attorney's fees caused by the County's outrageous behavior. However, at the hearing on that issue (October 27, 2008), the District Judge denied an award of attorney's fees or costs. R. Vol. I, p. 112.

The District Judge made the following findings relative to the attorney's fees request:

> "...Idaho doesn't follow the English rule, it follows the American rule in which you get no attorney's fees unless provided for by statute or contract. Mr. Masingill correctly states that 12-117 and 12-120 have both set forth a threshold on which one may secure fees. **In this Court's view they both rise to the level of frivolity**, and **there is no construction of these facts that I can find that the County defended frivolously in any means, it's just a matter of confusion**. The application for attorney fees will be denied." R. Vol. I, p. 37, lines 23-25, and R. Vol. I, p. 38, lines 1-11.

When Smith appealed the District Judge's decision, based on the Court's finding above, the Idaho Supreme Court required the District Judge to issue a final order for purposes of appeal. As a result, the District Judge issued his Final Order on February 18, 2009. R. Vol. I, p. 120-121. The District Judge's Final Order stated as follows:

> "No new evidence was presented or testimony adduced that in any way alters the previous determination of the Court;
> **The defense of this case was not frivolous**;
> The State of Idaho does not follow the English rule; and
> **There is no contractual or applicable statute upon which to base attorney's fees**." R. Vol. I, p. 120-121.

Smith seeks review by the Idaho Supreme Court on the only issue before it, the District Judge's denial of Smith's request for attorney's fees and costs. The County has not appealed the District Court's underlying decision.

## ISSUES PRESENTED ON APPEAL

**(1)** Did the District Court err, after finding Smith was the prevailing party, in failing to award attorney's fees pursuant to ***Idaho Code 12-120***?

**(2)** Did the District Court err, after finding Smith was the prevailing party, in failing to award attorney's fees pursuant to ***Idaho Code 12-117***?

**(3)** Did the District Court err, after finding Smith was the prevailing party, in failing to award attorney's fees pursuant to ***Idaho Code 12-121***?

**(4)** Did the District Court err, after finding Smith was the prevailing party, in failing to award costs pursuant to ***Idaho Code 12-101*** and ***IRCP 54 (d)(1)?***

**(5)** Pursuant to ***IAR 35(5)*** Appellant requests attorney's fees on appeal. The basis for that request is pursuant to ***Idaho Code 12-117***, ***Idaho Code 12-120(3), Idaho Code 12-121,*** and ***IRCP 54***.

## ARGUMENT

## I.

## THIS LAWSUIT INVOLVED A COMMERCIAL TRANSACTION AND SMITH WAS THE PREVAILING PARTY

### A. Prevailing Party:

Smith brought this action to obtain a building permit from the only entity he could do so lawfully. The County is in the business of providing building permits for a fee.

Smith is the prevailing party in this litigation. ***IRCP 54(d)(1)(B)*** provides that to determine the prevailing party entitled to costs and fees:

> "the courts shall consider the final judgment or result of the action in relation to the relief sought by the respective parties, whether there were multiple claims, multiple issues, counterclaims, third party claims, cross-claims, or other multiple or cross issues between the parties, and the extent to which each party prevailed upon each of such issues or claims."

Smith's lawsuit requested a building permit. The lawsuit resulted in the District Court requiring the County to issue the building permit. Smith was clearly the prevailing party.

### B. Commercial Transaction:

Smith is entitled to recover his reasonable attorney's fees and costs because the subject matter of this dispute was a 'commercial transaction'. The County is in the business of issuing building permits for a fee. The County charges a significant fee for that service.

***Idaho Code §12-120(3)*** provides:

> " 3) In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services **and in any commercial transaction** unless otherwise provided by law, **the prevailing party shall be allowed a reasonable attorney's fee** to be set by the court, to be taxed and collected as costs."

The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

No one may construct a building without first obtaining a building permit. Although this case involves a residential building permit, Smith is not a contractor, so the permit is for the purpose of allowing Smith to hire a contractor to build his residence. As to the County, selling a building permit is a commercial transaction. This court has determined that it is the underlying claim which is determinative, not the perspective of either party to the transaction. ***City of McCall v. Buxton***, 201 P.3d 629 (Idaho, 2009).

This court overruled its former position relative to commercial transactions in ***Blimka v. My Web Wholesaler, LLC,*** 143 Idaho 723, 152 P.3d 594 (Idaho, 2007) stating:

> "An award of attorney fees under Idaho Code § 12-120(3) is proper if "the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover." Brower v. E.I. DuPont De Nemours and Co., 117 Idaho 780, 784, 792 P.2d 345, 349 (1990)."

In the ***Buxton*** case, McCall's attorneys were awarded attorney's fees by the District Court. Although the attorney's fee issue was sent back to the District Court for determination on remand, ***Buxton*** seems to indicate the "commercial" aspect of the

transaction need only be "commercial" to one of the parties, not all parties. Thus, applying ***Buxton***, supra, to the instant case, even though the transaction to Smith could be considered a household transaction, it is a commercial transaction to the County. Pursuant to ***Buxton***, ***Idaho Code 12-120(3)*** is applicable because the building permit was integral to the claim.

**C. Contract Relating to the Purchase of Goods or Services:**

The court in ***Buxton*** explained there are two portions of ***Idaho Code 12-120(3)*** which need to be considered, and that they are separate:

> "The first portion of Idaho Code § 12-120(3) only provides for the awarding of attorney fees in actions to recover on what would be contract actions. It begins, "In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services...." However, the latter portion of the statute does not contain any such limitation. It mandates the awarding of a reasonable attorney's fee to the prevailing party "in any commercial transaction." The latter portion of the statute is not limited to contract actions. It "does not require that there be a contract between the parties before the statute is applied; the statute only requires that there be a commercial transaction." Great Plains Equip., Inc. v. Northwest Pipeline Corp., 136 Idaho 466, 472, 36 P.3d 218, 224 (2001). As we stated Blimka v. My Web Wholesaler, LLC, 143 Idaho 723, 728-29, 152 P.3d 594, 599-600 (2007):"

Smith was purchasing a building permit and the same is either "goods", "merchandise", or "services" in this transaction. The purchase is in the nature of a contract. Smith must follow the rules set forth by the County by preparing and submitting an application to the County for the building permit. Smith pays the fee and the County researches the issues and grants the permit. The transaction between these two parties is contractual. Thus, Smith contends that the first portion of ***Idaho***

***Code 12-120(3)*** applies to this transaction, as well as the commercial transaction portion of the statute.

The District Judge did not rule on the applicability of either parts of ***Idaho Code 12-120(3)***. The District Judge stated that in his mind both ***Idaho Code 12-121*** and ***Idaho Code 12-117*** required a finding of "frivolity. ." Tr. Vol. I, p. 37, lines 23-25, and Tr. Vol. I, p. 38, lines 1-11.

Based on the foregoing, Smith respectfully asserts that the District Judge erred when he failed to grant Smith attorney's fees and costs pursuant to ***Idaho Code 12-120(3).***

## II.

## SMITH IS ENTITLED TO ATTORNEY'S FEES AND COSTS PURSUANT TO IDAHO CODE 12-117

### A. The Statute.

***Idaho Code 12-117*** was enacted to provide mandatory relief to persons who have incurred attorney's fees and costs because a governmental agency acted without any basis in law or fact.

**Idaho Code 12-117** reads as follows:

> "In any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, **a county** or other taxing district and a person, the court **shall** award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered **acted without a reasonable basis in fact or law**."

***Idaho Code 12-117*** is somewhat unusual in that it applies not only to the judicial phase, but also authorizes attorney fee awards with respect to the underlying administrative action. ***Stewart v Dep't of Health and Welfare,*** 115 Idaho 820 (1989); see also ***Cox v Dept. of Insurance, State of Idaho***, 121 Idaho 143 (CT. App. 1991); ***Ockerman v Ada County Bd. of Comm'rs***, 130 Idaho 265 (Ct. App. 1997).

***Idaho Code 12-117*** supplants the private attorney general doctrine. ***State v Hagerman Water Right Owners***, Inc., 130 Idaho 718 (1997). Although the ***Hagerman*** case held that ***Idaho Code 12-117*** was the exclusive means of recovery against a State, that decision predated the newer versions of the statute, which expanded the statute's coverage to Counties and other governmental agencies.

Smith brought this action to obtain a building permit under the County's procedures and rules. This should have been a very short and straightforward process. The Court, however, found:

> "the procedural course of this case is in shamble. Documents were lost, hearings advertised and not held, procedures not followed, and the like." R. Vol. I, p. 63.

Turning to the substantive lack of foundation, the County's code clearly provided that there is no width requirement for a "driveway" to a single residence. The District Judge confirmed that fact in its Memorandum Decision (R. Vol. I, p. 63) as follows:

> "There is no code that addresses the minimum width for a driveway providing access to only one house, as is the case here."

In complete contradiction to the specific and clear statement in ***Washington County Code 5-3-5B(2)***, the County sought, without any factual or legal basis, to

require Smith to build his driveway 20 feet in width, while permitting the driveway widths in both the Weiser and Cambridge Rural Fire Districts to be 16 feet. If the code actually required a twenty foot width, there is no factual or legal basis for the County to allow 16 foot driveways to exist in the most populated two areas in the County, i.e. Cambridge and Weiser. The District Judge pointed out that irony at R. Vol. I, p. 63-64:

> "However, the evidence presented indicates that there is confusion and a lack of uniformity between the fire districts within Washington County as to the interpretation and application of the IFC. This conflict in combination with the actions of the Commissioners in failing to hold the required hearings and failing to maintain documentation, leads to the conclusion that the decisions to deny the permit and variance are not only not supported by substantial evidence, but are likewise arbitrary and capricious and an abuse of discretion."

The County maintained in this case that state law mandated a 20 foot wide driveway, which the County was happy to impose on Smith, while selling permits to residents of Washington County within the Weiser and Cambridge Rural Fire Districts with 16 foot wide driveways. See R. Vol. I, p. 31 where the County's Findings of Fact state:

> "Based upon the foregoing, the impact of the adoption of the IFC is that the IFC **is a state-wide minimum standard**..."

**1. Lack of Basis in Law:** The foregoing position of the County was not based on law. The County's position relative to Smith's driveway was, as the District Judge concluded, contrary to the clear language of its own ordinance. It was further in contravention of its own practice, in that a state-wide standard is just that, state-wide. Thus, selling permits to part of Washington County with a 16 foot wide minimum, while imposing a 20 foot wide minimum on Smith's driveway, revealed the County of

Washington was arbitrary in its practice. The County continued to do so until the District Judge entered his memorandum opinion pointing out the absurdity of the County's position.

**2. Lack of Basis in Fact:** As to the facts, the County's position relative to Smith had no basis. The facts were uncontradicted that Smith was complying with the County's own ordinance by constructing a driveway at least 16 feet in width, with turn outs as required by the ordinance. Smith properly applied for the permit and jumped through every hoop the County required of him. After doing so, the County continued to adhere to its "unwritten rule" that the consent of the Midvale Fire District was a pre-condition to the County issuing a building permit. There were no facts in favor of the County in this case. The County required Smith to follow rules which were not in writing, not in the County's code, and were being applied differently in other areas within the County.

The County has no legal and no factual basis upon which it could justify its dogged adherence to an unwritten, capricious, arbitrary rule The District Judge correctly found that adherence to be an abuse of discretion.

Faced with a decision by the District Judge which finds the County's actions toward Smith to be arbitrary, capricious, and an abuse of discretion, (as well as violating significant rights of Smith) it defies logic to fail to make Smith whole by awarding fees and costs.

The lack of (1) any justifiable facts **or** (2) the lack of any law supporting the County's failure to grant Smith a building permit mandates an award of attorney's fees and costs pursuant to ***Idaho Code 12-117***.

The District Judge could have been under the impression that Smith had to show both a lack of law and a lack of facts justifying the County's actions. That, however, would be incorrect as a matter of law. ***Idaho Code 12-117*** is phrased in the conjunctive. All Smith is required to show under ***Idaho Code 12-117*** is **either** (1) no fact or (2) no law supporting its position.

The District Judge's reasoning as set forth in the hearing transcript and again in the Final Order cannot be squared with the mandatory requirement of ***Idaho Code 12-117.***

It further appears the Trial Judge believed the factors to be considered in arriving at an award of attorney's fees in ***Idaho Code 12-121*** were identical to the factors required in ***Idaho Code 12-117***. The Trial Judge stated:

> "...Idaho doesn't follow the English rule, it follows the American rule in which you get no attorney's fees unless provided for by statute or contract. Mr. Masingill correctly states that 12-117 and 12-120 have both set forth a threshold on which one may secure fees. **In this Court's view they both rise to the level of frivolity**, and there is no construction of these facts that I can find that the County defended frivolously in any means, it's just a matter of confusion. The application for attorney fees will be denied." Tr., Vol. I, p. 37, lines 23-25, and Tr. Vol. I, p. 38, lines 1-11.

It appears the Trial Judge felt the requirement for an award of attorney's fees and costs is "frivolity". In fact, the factors are different. ***Idaho Code 12-121*** has frivolity as a factor. However, ***Idaho Code 12-117*** mandates fees and costs in situations just as those in the instant case.

**B. Case Law.**

Idaho case law provides that a Board is obligated to follow the provisions contained in its zoning ordinance. ***Lowery v. Board of County Commissioners for Ada County,*** 115 Idaho 64 (Ct.App.1988).

***Idaho Code 12-117*** has been applied by this court against persons who have filed cases against the government. One of which involved essentially what the County did in this case, i.e. failed to follow its rules. This court stated in ***Waller v. State***, 146 Idaho 234 (Idaho, 2008) as follows:

> "The State requests attorney fees on appeal pursuant to ***I.C. § 12-117***. Under that statute, this Court must award attorney fees where a person did not act with a reasonable basis in fact or law in a proceeding involving a state agency which prevails in the action. Id.; Rincover v. State, Dep't of Fin., Sec. Bureau, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999). On appeal, Waller has not acknowledged, much less addressed, the decisions of this Court relating to application of the doctrine of res judicata in cases involving default judgments. He has identified no legal authority to support his claim of entitlement to pursue an independent action to set aside the default judgment. He has not addressed the district court's factual or legal findings regarding his claim for equitable relief. Under these circumstances, we find that Waller has pursued this appeal without a reasonable basis in fact or law and award attorney fees to the State pursuant to I.C. § 12-117. "

In ***Euclid Avenue Trust v City of Boise***, 146 Idaho 306 (2008), this court found in favor of the City of Boise under Idaho Code 12-117, as follows:

> " The City contends it is entitled to an award of fees under I.C. § 12-117(1). I.C. § 12-117(1) allows the court to award attorney fees and other expenses where the court finds a person pursued an action against a city without reasonable basis in fact or law. An award of attorney fees is appropriate here because this Court is left with the abiding feeling that the appeal was pursued without reasonable basis in fact or law. As mentioned above, most of the issues were moot. In oral argument before the Court, Euclid's counsel essentially conceded that the appeal

was primarily for the purpose of making a point and that any claim for damages was rather tenuous. In any event, that issue was conceded away in Euclid's brief. Thus, the City is entitled to its attorney fees on appeal."

***Waller*** and ***Euclid***, supra, are the only Idaho cases counsel could find where an award was granted or affirmed under ***Idaho Code 12-117***. They are both in favor of the government.

Speaking of the award of attorney's fees and cost against Mr. Waller, Justice Jones, concurring, made the following observation:

> "Mr. Waller is in an unfortunate predicament but it is primarily of his own making. The rules that result in a denial of relief to Mr. Waller are well settled and it would be inappropriate for the Court to bend those rules to allow relief here."

The County is in the same position which Mr. Waller found himself. The County went out of its way (as did Mr. Waller) to make its simple procedure complicated, and its decision arbitrary and capricious. Thus, the predicament the County finds itself in is of its own doing. As to the well-settled rules mentioned by Justice Jones in **Waller**, supra, the rules (the Washington County Code) in play in the case at bar were equally well-settled. The County should compensate Smith for its failure to follow its own rules, just as Mr. Waller was required to do.

***Euclid***, supra, is similar to the case at bar. ***Euclid's*** claims were moot when they came before the court on appeal, and others were conceded to be interposed for a collateral purpose. The present case is similar in that the County pleaded and briefed a position which contradicted it's own ordinance, and the same was conceded by the County's attorney in open court. The County also put Smith in the middle of a collateral issue, that being the County's position relative to the Midvale Fire District as to the width

of driveways. That issue was between the County and the District and the County had no right to deny Smith's building permit unless he could somehow find a way to get that conflict resolved. Also, the County contended Smith had failed to file a necessary document (in a memorandum filed at 4:46 p.m. on Friday-prior to a Monday hearing). The County's attorney averred in the memorandum that the necessary documentation was not filed to support Smith's application. The County's allegation was subsequently shown to be false. The document the County claimed was not filed with the application is set forth at R. Vol. I, p. 21. It is one of the "lost documents" the court referenced in its Memorandum Decision of September 5, 2008, at page 3. (R. Vol. I, p. 63).

One of the other "lost" documents was referenced by Mr. Kroll at Tr. Vol. I, p. 6 where he states:

> "Your Honor, in speaking with the building inspector Friday, it was my understanding that there had never been application. There had been an application to build another building which is not a residence which has different requirements, and that happened back in I think 2006, and now there's an application to build a residence, and that's the issue we're dealing with now."

In one paragraph, Mr. Kroll contended no application for a building permit had been filed with the county, and then contradicted himself that there was an application to build a residence.

Smith's counsel pointed out at Tr. Vol. I, p. 4-5 that in fact one had to have been filed because attached to one of Mr. Smith's affidavits was a letter from the County building commissioner, Rob Dickerson:

> "And this is a first for me, and I think his own letter implies that, yes, it was submitted. I don't think he would have responded to something that didn't exist, I would hope."

In response to one of Mr. Kroll's allegations that the proper paperwork had not been filed by Mr. Smith, the Court stated what was ultimately to become true:

"The Court: Or they were just lost." Tr. Vol. I, p. 7, line 8.

Further, the County refused to make a decision on either Smith's request for a building permit or upon his request for a variance. Smith had no choice but to file suit to force the County to make a decision.

The County created problems which increased the cost of litigation to Smith, all of which was found to be arbitrary, capricious, and an abuse of discretion by the District Judge. Frankly, if this case does not justify attorney's fees and costs to a private litigant against a governmental entity under ***Idaho Code 12-117***, there is no case in which an individual can ever prevail and be awarded fees or costs.

***Idaho Code 12-117*** was crafted by the legislature to address actions such as those of the County in this case.

Smith requests an award of reasonable attorney's fees and costs at the trial level, as well as on appeal.

## III.

## SMITH IS ENTITLED TO FEES AND COSTS PURSUANT TO IDAHO CODE 12-121

### A. Frivolous Defense:

***Idaho Code 12-121*** confers the broad power of the court to "award reasonable attorney fees to "a prevailing party or parties" in any civil action. An award under this

code section requires an analysis of ***IRCP 54(e)***, which generally provides that attorney fees can be awarded when the Court finds, from the facts presented, that the case was brought, pursued, or defended frivolously, unreasonably, **or** without foundation.

The standard for an award of attorney's fees under the authorities above were set forth as follows, in ***Ada County Highway Dist. By and Through Fairbanks v. Acarrequi***, 105 Idaho 873 (Idaho, 1983 ):

> "We note that the rule in most civil cases is that fees and costs are awardable only to the prevailing party, I.C. § 12-121, as determined by the standards of I.R.C.P. 54(d)(1)(B). As to attorneys' fees, I.R.C.P. 54(e)(1) is an explanatory gloss on I.C. § 12-121 and provides that "attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued **or** defended frivolously, unreasonably **or** without foundation." Hence, assuming Rule 54(e)(1) was applicable to the present case, and under the case law until today, attorneys' fees were improperly awarded in the absence of a finding of frivolity, unreasonableness **or** lack of foundation."

In the case at bar, the County provided the District Court with no cogent argument why it's clear and unambiguous code, **Section B of Title 5-3-5**, (which did not require any certain width of a driveway to a single residence) was not applicable. In fact, the findings by the trial judge show the County acted arbitrarily, capriciously, and abused its discretion in taking that position. Such actions are clearly frivolous, unreasonable, and without foundation. Smith had to prove only one of the elements, i.e. (1) frivolous, (2) unreasonable, or (3) without foundation.

***Idaho Code 12-121*** applies to the facts and actions of the County in this case. The District Judge made a conclusion that he did not feel the County's actions rose to the "level of frivolity". Tr. Vol. I, p 37, lines 23-25, and Tr. Vol. I, p. 38, lines 1-11.

The County **(1)** made broad and unsupportable statements, i.e. claiming its code required a 20 foot wide drivable surface on a driveway to a single residence, **(2)** none of it's statements explained why the County was entitled to ignore the code provisions applicable to this matter, and **(3)** made the claim that it's code required a width of 20 feet, which was contradicted by the County's own counsel in open court. Tr. Vol. I, p. 19, lines 3-6 where Chuck Kroll stated:

> "And I agree with counsel that there is nothing in the County ordinance that talks about single driveways, the direction is either a private road or to driveways serving two people."

The County asserted that it's code, which clearly provides no width requirement for a driveway to a single residence, provided just the opposite. Such a position was, and still is, indefensible, frivolous, without foundation, and unreasonable. Taking a position which directly conflicts with the County's code is sufficient reason for granting attorney's fees and costs under ***Idaho Code 12-121***.

As to the frivolous nature of County's defense of this case, the County contended the code was applied properly in numerous documents, despite Smith continually pointing out that flawed analysis. Other than the statement by Mr. Kroll in open court acknowledging the clear intent of the County's own code, the paperwork filed by the County continued to deny the code's applicability to Smith's situation. See R. Vol. I, p. 16 in which County's answer the following is stated:

> "Third Affirmative Defense-XII-Issuance of a building permit would be in violation of the Washington County Code."

See further R. Vol. I, p. 7-8, paragraph 9, in the County's Findings of Fact:

"9. Even if the driveway does not service two (2) houses for its entire length, section 5-3-4 D of the WCC states that 'No building permit for a residence will be issued in any zone unless the private road or driveway serving the residence meets the standards of section 5-3-5 of this chapter.' ***Consequently, even a driveway serving only one (1) house has to have a 20 foot driving surface***."

The foregoing falsehoods appear in the County's Findings of Fact, page 8, filed April 28, 2008, (which is completely contradicted by Mr. Kroll's statement on the record on May 27, 2008). Tr. Vol. I, p. 19, lines 3-6.

The false statements of law continued as shown on April 14, 2008 (on the record) where Mr. Kroll stated:

"Your Honor, **either the private road or the driveway both require 20 feet**, so it doesn't matter what we call it, but our concern is that its either 20 feet or its something that's acceptable to the fire district. **And that's what the code section says in both, whether a private road or the driveway description**." Tr. Vol. I, p. 10-11, lines 24-25 and 1-5.

The code section **5-3-5B(2)** actually states in pertinent part:

2. **All private driveways serving two (2) houses shall have** a recorded easement of at least twenty six feet (26') with **twenty feet (20') of finished roadway**..."

The entire procedural process, which the Court referred to as "in shambles", cost Smith so much in attorney's fees that he may have been better off to comply with the County's unlawful dictates by building a driveway 20 feet wide (in addition to multiple turnouts). This strong-arming tactic of the County needs to be deterred. The County has acted frivolously, unreasonably, and without a foundation at every turn in this case.

The County:

1. made Smith meet two times with an entity which has no lawful applicability to Smith's single residential driveway; and

2. denied the building permit without a decision or hearing; and

3. made Smith file a request for a variance which the County denied without any evidence and without the mandatory hearing its own code requires.

It was only the action of the District Court which required the County to make any decision at all. R. Vol. I, p. 18-Order Directing the Washington County Commissioners to Enter It's Decision on Plaintiff's Application for Building Permit.

The County's refusal to grant a simple building permit to Smith, which the District Judge found was arbitrary, capricious, and an abuse of discretion is the basis for an award of attorney's fees and costs pursuant to ***Idaho Code 12-121***.

Subsequent to filing this appeal, in ***Johnson v. Blaine County***, __ Idaho ____, 204 P.3d 1127 (Idaho, 2009) this court made the following determination regarding ***Idaho Code 12-121***:

> "Clear Creek seeks an award of attorney fees pursuant to Idaho Code § 12-121. That statute does not provide for the award of attorney fees in a petition for judicial review. Lowery v. Board of County Comm'rs for Ada County, 117 Idaho 1079, 1082, 793 P.2d 1251, 1254 (1990)." (emphasis added).

This case is difficult to reconcile with the judicial review standard above, since it involved a civil complaint for mandamus, which the trial judge turned into a judicial review case Thus, Smith's position is that I***daho Code 12-121*** applies to the case at bar, simply by virtue of the underlying method of obtaining a remedy.

The District Judge's determination that the case was not defended frivolously is not in keeping with the findings in the underlying case. In addition, Smith only has to provide the court with one of the three factors to obtain an award. The District Judge did not address the other two factors which entitle Smith to an award, i.e.

unreasonableness or lack of foundation. The District Judge erred in failing to award attorney's fees and costs to Smith under ***IRCP 54*** and ***Idaho Code 12-121.***

## IV.

## COSTS

**A. Costs Generally:** In Idaho, "costs" incurred in an action are to be paid as set forth in the rules of the court. ***Idaho Code 12-101*** states as follows:

> *"**12-101. Costs.*** Costs shall be awarded by the court in a civil trial or proceeding to the parties in the manner and in the amount provided for by the Idaho Rules of Civil Procedure."

**B. Costs as a Matter of Right.** Costs as a matter of right are set forth in ***IRCP 54(d)(1)(C).*** Those costs include the filing fee, both for the filing of the instant case, and the filing fee for the variance, which was never required and was the proximate and actual cause of the Commissioners' outrageous denial of the building permit.

The costs incurred by Smith include the filing fee of $88.00 for the instant case, the sum of $97.60 for the variance action, the cost of obtaining a copy of the Midvale Rural Fire District bylaws, minutes, and decision in the amount of $184.22, and the cost of $3.50 for a certified copy of the Judgment. R. Vol. I, p. 79-81 and p. 104.

**C. Discretionary Costs:**

Discretionary costs were included in Exhibit A to the Affidavit of R. Brad Masingill in Support of Motion for Attorney Fees and Costs filed with the court. R. Vol. I, p.79-81, and p. 103-104. They should have been awarded to Smith by the District Judge. A proper showing of those costs was made by Smith, and they should be awarded to Smith pursuant to ***Idaho Code 12-101***, and ***IRCP 54(d)(1)(C).*** The District Court made no reference in its decision why either mandatory or discretionary costs were not allowed.

## CONCLUSION

In over 30 years of practicing law, this attorney has failed to observe conduct of an opposing party more clearly in need of sanctions. The interposed defenses, which included failing to follow the County's own code, and the complete indifference to the right of Smith to obtain a permit to build his house justifies reimbursement of the attorney's fees and costs Smith incurred.

The District Court failed to award fees and costs under any of the code sections which Smith appears to be justly entitled. The findings of the District Judge in the decision granting Smith his building permit, cannot be squared with the failure of the District Judge to award Smith attorney's fees and costs.

It is respectively observed that the Idaho Supreme Court recognized its duty to award attorney's fees and costs against Mr. Waller in favor of the governmental entity

involved when the government was the one asking for the award. This Court should apply that rule equally when a private party is put to the task of making the District Judge order a governmental entity to do its job.

***Idaho Code 12-117*** is the legislature's pronouncement that governmental entities are not allowed to deny Idaho citizen's his or her rights when that entity does so without either a factual basis or legal basis.

The County of Washington clearly acted toward Smith without any factual or legal basis. A more compelling case for application of ***Idaho Code 12-117*** in favor of an Idaho citizen has not been found to have made its way to this Court.

Dated: June 30, 2009

R. Brad Masingill
Attorney for
David D. Smith

## CERTIFICATE OF MAILING

**I HEREBY CERTIFY** that on the 30th day of June, 2009, I mailed two true copies of David Smith's Brief by United States Mail, postage prepaid to:

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R. Brad Masingill